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SUPREME COURT, U.S.
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NO. 06-413

IN THE SUPREME COURT OF THE UNITED STATES

JEFFREY A. UTTECHT,

Petitioner,

v.

CAL COBURN BROWN,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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TABLE OF CONTENTS

REPLY BRIEF FOR THE PETITIONER 1

1. Brown Failed To Rebut With Clear And Convincing Evidence The State Courts' Finding Of Fact That Mr. Deal Was Substantially Impaired 1

   a. The State Courts' Finding That Mr. Deal Was Substantially Impaired Is Entitled To The Presumption Of Correctness Under § 2254(e)(1) 2

   b. The Trial Court's Decision To Remove Mr. Deal Is Entitled To Deference 2

   c. Brown Has Not Met His Burden Under § 2254(e)(1) 5

2. The State Court Decision Was A Reasonable Application Of Federal Law In Light Of The State Court Factual Findings 9

   a. The State Court Decision Was Not Contrary To Clearly Established Federal Law 10

   b. The State Court Decision Was Not An Unreasonable Application Of Federal Law 10

3. The State Court Decision That Mr. Deal Was Substantially Impaired Was Not Based On An Unreasonable Determination Of Facts Under § 2254(d)(2) 15

4. Conclusion 18

TABLE OF AUTHORITIES

Cases

Bradshaw v. Richey
126 S. Ct. 602 (2005).....3, 6, 14

Burden v. Zant
498 U.S. 433 (1991)..... 6

Darden v. Wainwright
477 U.S. 168 (1986).....1–4, 11, 16

Estelle v. McGuire
502 U.S. 62 (1991).....14

Gomez v. United States
490 U.S. 858 (1989)..... 6

Holland v. Jackson
542 U.S. 649 (2004).....10

LaVallee v. Delle Rose
410 U.S. 690 (1973)..... 3

Lockyer v. Andrade
538 U.S. 63 (2003).....10, 11

Maggio v. Fulford
462 U.S. 111 (1983)..... 6

Marshall v. Lonberger
459 U.S. 422 (1983)..... 5

Miller-El v. Dretke
545 U.S. 231 (2005).....16

Morgan v. Illinois
504 U.S. 719 (1992).....17

Mullaney v. Wilbur
421 U.S. 684 (1975).....14

Patton v. Yount
467 U.S. 1025 (1984).....6, 8, 17

Rice v. Collins
126 S. Ct. 969 (2006) 16

Rushen v. Spain
464 U.S. 114 (1983) 5

Strickland v. Washington
466 U.S. 668 (1984) 4

Sumner v. Mata
449 U.S. 539 (1981) 6

Wainwright v. Witt
469 U.S. 412 (1985) 1–4, 6–8, 10–12, 16, 17

Williams v. Taylor
529 U.S. 362 (2000) 11

Witherspoon v. Illinois
391 U.S. 510 (1968) 8

Woodford v. Visciotti
537 U.S. 19 (2002) 11

Yarborough v. Alvarado
541 U.S. 652 (2004) 11

Statutes

28 U.S.C. § 2254 1

28 U.S.C. § 2254(d)(1) 8–10, 15

28 U.S.C. § 2254(d)(2) 15, 16

28 U.S.C. § 2254(e)(1) 1–3, 5, 9, 16

REPLY BRIEF FOR THE PETITIONER

Brown states that the Ninth Circuit's opinion "is not entirely clear as to which precise section of the Antiterrorism and Effective Death Penalty Act of 1996 [AEDPA] controls this case." Br. Resp't 10. This is an understatement. Apart from a few fleeting references to 28 U.S.C. § 2254 (Pet. App. 14a, 19a), the Ninth Circuit did not apply the standards required by AEDPA and, instead, simply substituted its judgment for that of the trial court and the Washington Supreme Court. When the proper standards of § 2254 are applied, the decision below must be reversed.

1. Brown Failed To Rebut With Clear And Convincing Evidence The State Courts' Finding Of Fact That Mr. Deal Was Substantially Impaired

Under AEDPA "a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence." 28 U.S.C. § 2254(e)(1), J.A. 160. The determination that a juror is substantially impaired is a factual determination that necessarily requires evaluation of the juror's credibility, including the juror's demeanor. *Wainwright v. Witt*, 469 U.S. 412, 429 (1985); *Darden v. Wainwright*, 477 U.S. 168, 175–76 (1986). For this reason, the trial court's ability to evaluate a juror's demeanor during voir dire is entitled to deference by the reviewing court in a habeas corpus proceeding. *Witt*, 469 U.S. at 424–26; *Darden*, 477 U.S. at 178. The Ninth Circuit in the decision below erred by refusing to grant the presumption of correctness to the state courts' finding that Mr. Deal was substantially impaired. The circuit court also erred by refusing to grant any deference to the trial court's ability to evaluate Mr. Deal's demeanor.

a. The State Courts' Finding That Mr. Deal Was Substantially Impaired Is Entitled To The Presumption Of Correctness Under § 2254(e)(1)

The Ninth Circuit avoided the requirement of § 2254(e)(1) because it held that the state courts never entered a finding that Mr. Deal was substantially impaired. Pet. App. 13a, 19a–20a n.10.

This holding is fundamentally incorrect. The Washington Supreme Court expressly stated that Mr. Deal was substantially impaired. Pet. App. 208a ¶ 10; Br. Pet'r 23. And the trial court's decision granting the prosecutor's challenge that Mr. Deal was substantially impaired constituted an implicit finding of fact that was entitled to the presumption of correctness. In both *Witt* and *Darden*, this Court accorded the presumption of correctness to the dismissal of a juror without an express finding that the juror was substantially impaired. *Witt*, 469 U.S. at 430; *Darden*, 477 U.S. at 175; Pet. Br. 23–26. Even Brown now retreats from the decision below and "assumes that AEDPA standards of review apply to both implicit and express findings by state trial courts." Br. Resp't 19 n.7.

Based on Brown's statement, the parties agree that the state courts' finding that Mr. Deal was substantially impaired is entitled to the presumption of correctness, and the burden is on Brown to overcome the presumption with clear and convincing evidence.

b. The Trial Court's Decision To Remove Mr. Deal Is Entitled To Deference

The Ninth Circuit held that the trial judge's ability to observe Mr. Deal's demeanor was not entitled to any deference because the transcript of the voir dire was clear. Pet. App. 17a n.8. There is no clear transcript exception to the requirement that a federal court,

in a habeas case, grant deference to the trial court's ability to evaluate a juror's demeanor during voir dire. Br. Pet'r 33–35.

Brown argues that the Court should grant deference to the trial court only where the record contains some express evidence regarding the juror's demeanor.[1] Br. Resp't. 24–25. Brown cites no authority to support this claim, and it is contrary to this Court's precedent.[2] In both *Witt* and *Darden*, this Court granted deference to the trial court, even though there was no express evidence in the transcripts regarding the jurors' demeanor. In *Witt*, this Court explained, whether a juror is substantially impaired "is based upon determinations of demeanor and credibility that are peculiarly within a trial judge's province." *Witt*, 469 U.S. at 428. *Witt* affirmed the challenge to the juror because "although not crystal clear from the printed record," the reason why no one in the courtroom questioned the juror's excusal "may well have been readily apparent to those viewing Colby as she answered the questions." *Witt*, 469 U.S. at 435. In *Darden*, the Court stated that the "trial court, aided as it undoubtedly was by its assessment of the potential juror's demeanor, was under the obligation to determine whether [the juror's] views would prevent or substantially

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[1] Contrary to Brown's claim, there is some evidence of Mr. Deal's demeanor in the transcript. In making his challenge, the prosecutor described Mr. Deal as "very confused" and stated that Mr. Deal "has some real problems" about a defendant having to be in a position to kill again before he could impose the death penalty. J.A. 75.

[2] Brown's argument suggests that Uttecht bears some burden to support the state court finding of fact, and that the Court should not defer to the trial judge absent some proof as to Mr. Deal's demeanor. However, under 28 U.S.C. § 2254(e)(1), Brown bears the burden of rebutting the finding by clear and convincing evidence. Uttecht bears no burden to support the finding. *See Witt*, 469 U.S. at 435; *Bradshaw v. Richey*, 126 S. Ct. 602, 605 (2005); *LaVallee v. Delle Rose*, 410 U.S. 690, 695 (1973).

impair the performance of his duties as a juror." *Darden*, 477 U.S. at 178 (citations and internal quotation marks omitted).

Brown's claim that deference is only required when there is evidence of demeanor in the record is especially misplaced when, as in this case, defense counsel does not object to the challenge. In both *Witt* and *Darden*, this Court found it noteworthy that defense counsel did not object to the prosecutor's challenge that the jurors in those cases were substantially impaired. *Witt*, 469 U.S. at 430–31 ("it is noteworthy that in this case the court was given no reason to think that elaboration was necessary; defense counsel did not see fit to object to juror Colby's recusal, or to attempt rehabilitation"); *Darden*, 477 U.S. at 178 ("No specific objection was made to the excusal of Murphy by defense counsel.").

Brown argues that defense counsel's failure to object does not constitute waiver of his claim that Mr. Deal was improperly dismissed. Br. Resp't 29–31. Brown's argument misses the point. We do not argue that defense counsel's failure to object waived Brown's claim. Rather, the failure to object is a factor to consider in reviewing the trial court's action. The Court in *Witt* spoke directly to this point, stating that "counsel's failure to speak in a situation later claimed to be so rife with ambiguity as to constitute constitutional error is a circumstance we feel justified in considering when assessing respondent's claims." *Witt*, 469 U.S. at 431 n.11. There is no claim that Brown's defense counsel provided ineffective assistance in failing to object to Mr. Deal's removal. Br. Pet'r 39. Counsel is presumed to have provided reasonably competent representation. *Strickland v. Washington*, 466 U.S. 668, 690 (1984). The courts therefore must presume that, if defense counsel believed Mr. Deal was not substantially impaired,

he would have objected to the prosecution's challenge for cause.

c. Brown Has Not Met His Burden Under § 2254(e)(1)

Brown argues that there is clear and convincing evidence in the record that Mr. Deal was fit to serve on the jury. Br. Resp't 20. Brown primarily relies on one question and answer in the transcript:

> "But in the situation where a person is locked up for the rest of his life and there is no chance of him ever getting out again, which would be the situation in this case, do you think you could also consider and vote for the death penalty under those circumstances?
>
> "Juror Deal's unequivocal answer was:
>
> I could consider it, yes. JA 73." Br. Resp't 14.

Brown also emphasizes that Mr. "Deal never said he could only impose the death penalty if there were proof that the defendant would kill again." Br. Resp't 13.

Apart from Brown's selective reading of the transcript, discussed below, his argument essentially is that a federal court may substitute its judgment for that of the trial court on the factual issue of substantial impairment if, after an independent review of the voir dire transcript, the federal court simply disagrees with the state court's finding. The presumption of correctness "requires that a federal habeas court more than simply disagree with the state court before rejecting its factual determinations." *Rushen v. Spain*, 464 U.S. 114, 121 n.6 (1983); *Marshall v. Lonberger*, 459 U.S. 422, 433 (1983). The statute does not allow the federal court to simply substitute its own judgment for that of the state court on

a factual issue. *Maggio v. Fulford*, 462 U.S. 111, 113 (1983). This is especially true where the federal court is simply reviewing the identical transcripts reviewed by the state court. *Sumner v. Mata*, 449 U.S. 539, 547 (1981). The federal court may not disregard the state court finding of fact unless the federal court first specifically determines that the evidence clearly and convincingly rebuts the state court finding of fact. *Bradshaw v. Richey*, 126 S. Ct. 602, 605 (2005); *see also Sumner*, 449 U.S. at 548–49; *Burden v. Zant*, 498 U.S. 433, 437 (1991).

Brown's argument also ignores the deference owed to the trial court. "[N]o transcript can recapture the atmosphere of the voir dire . . . ." *Gomez v. United States*, 490 U.S. 858, 875 (1989). A trial court's determination that a juror is substantially impaired is based upon more than mere spoken words. It includes not only what is said, but also how it is said and the context in which the statements are made. The determination is based on the trial judge's observations of the entire voir dire process, including observations of the juror, the flow of the questions and answers, the prosecution's challenge for cause, and the response of defense counsel to the challenge. *Witt*, 469 U.S. at 424–26, 431 n.11; *Patton v. Yount*, 467 U.S. 1025, 1037–39 & n.14 (1984). An appellate court's review of a cold transcript that captures only one isolated portion of the entire jury selection process cannot rebut, by clear and convincing evidence, the finding that a juror is substantially impaired. Thus, even when a juror's "clear words" are that the juror could follow the law and impose the death penalty in a particular case, the question remains, "should the juror's protestation of impartiality have been believed." *Patton*, 467 U.S. at 1036. That question cannot be answered by review of a cold transcript.

Even if simple re-evaluation of the transcript by a federal court sitting in habeas could constitute clear and convincing evidence required to rebut a state court

finding of substantial impairment, Brown's argument here would fail. Brown asserts that the state court findings are rebutted simply because, at one point, Mr. Deal said he could consider imposing the death penalty. Brown's claim thus focuses on a single question, ignoring the rest of the voir dire. The trial court "views the questioning as a whole." *Witt*, 469 U.S. at 435. Indeed, "[o]ne of the purposes of [the statutory presumption of correctness] was to prevent precisely this kind of parsing of trial court transcripts to create problems on collateral review where none were seen at trial." *Witt*, 469 U.S. at 435. Focusing on an isolated answer to a single question cannot be the proper standard, because it improperly restricts the determination of bias. "[J]uror bias cannot be reduced to question-and-answer sessions which obtain results in the manner of a catechism." *Id.* at 424. When the voir dire is viewed as a whole, there is no clear and convincing evidence that the state court's findings are incorrect. Mr. Deal was repeatedly asked about his views regarding the death penalty, and his answers were inconsistent. Mr. Deal said he could consider the death penalty, but he also said that the death penalty would be appropriate "if a person is, would be incorrigible and would reviolate if released, I think that's the type of situation that would be appropriate." J.A. 62. Given the inconsistency in Mr. Deal's testimony, his answer to a particular question is not clear and convincing evidence to overcome the presumption that the state courts' findings were correct.

Moreover, contrary to Brown's argument, it was not necessary for Mr. Deal to say that he could never impose the death penalty for the state court to find him substantially impaired. The law does not require that a juror would automatically vote against the death penalty before he may be dismissed as impaired. *Witt*, 469 U.S. at 424. Nor is there a burden to prove bias with "unmistakable clarity." *Id.* at 421, 424. Instead,

regardless of what is said in response to a question, a judge may still determine the juror is substantially impaired if "the trial judge is left with the definite impression that a prospective juror would be unable to faithfully and impartially apply the law." *Witt*, 469 U.S. at 426.[3] The judge may choose to believe those statements that were the most fully articulated and least influenced by leading questions. *Patton*, 467 U.S. at 1039. Thus, the judge could give weight to Mr. Deal's repeated statements of when he believed the death penalty was appropriate, and discount as being influenced by leading questions the limited answer that he could consider and impose the death penalty. Based upon his observations of Mr. Deal throughout the voir dire, the judge could determine that Mr. Deal would be substantially impaired in his ability to consider and impose the death penalty unless the defendant would be in the position to be released and reoffend. This determination of credibility, of deciding which answers should be believed and given the most weight, is peculiarly within a trial judge's province. *Witt*, 469 U.S. at 428.

There also are two other parts of the record that Brown's claim of clear and convincing evidence cannot overcome. The first is the fact that defense counsel did not object to the prosecutor's challenge of Mr. Deal. Defense "counsel's failure to speak . . . is a circumstance we feel justified in considering when assessing respondent's claims." *Witt*, 469 U.S. at 431 n.11.

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[3] The argument that Mr. Deal must have expressly said he could not impose the death penalty is the equivalent of the standard suggested by dicta in *Witherspoon v. Illinois*, 391 U.S. 510 (1968), that the prosecution must show by unmistakable clarity that the juror could never impose the death penalty. The heightened standard suggested by Brown and his supporting amici, which was rejected by *Witt*, is not clearly established by the holdings of the Court and does not apply under 28 U.S.C. § 2254(d)(1).

Second, the record establishes that the trial judge in this case would not grant a challenge for cause unless the judge determined the juror was substantially impaired based upon the judge's own observations of that particular juror during voir dire. *See, e.g.*, J.A. 38–39 (denying prosecution's challenge because the judge found credible Juror Obeso's responses that he could follow instructions and consider both sentences); J.A. 117–18 (granting prosecution's challenge because Juror Henderson's "unsaid" body language was more convincing than her words). The prosecution challenged twelve jurors for cause based upon their views on the death penalty. J.A. 127–40. Defense counsel objected to seven of those twelve challenges. The trial court sustained defense counsel's objection as to five of the jurors, and overruled the objection as to the other two. *See* J.A. 127–40. Thus, the record establishes that the trial judge was carefully evaluating each challenge on its merits.

In sum, Brown has not met his burden under § 2254(e)(1). The presumption of correctness and the deference owed the trial court cannot be overcome by focusing on one question and answer in the transcript and the fact that Deal did not say he could never impose the death penalty. When the transcript is viewed as a whole, in light of the fact that defense counsel did not object and the trial judge's careful consideration of challenges to jurors throughout the voir dire, Brown has not met his burden.

2. The State Court Decision Was A Reasonable Application Of Federal Law In Light Of The State Court Factual Findings

28 U.S.C. § 2254(d)(1) provides that an applicant must prove that the state court decision was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme

Court of the United States . . . ." Brown does not satisfy either prong of § 2254(d)(1).

a. The State Court Decision Was Not Contrary To Clearly Established Federal Law

The Ninth Circuit granted habeas relief under § 2254(d)(1), because it determined that the state court "*applied the wrong standard*" and this "was directly contrary to Supreme Court precedent . . . ." Pet. App. 19a. A judge properly dismisses a prospective juror where "the juror's views would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'" *Witt*, 469 U.S. at 424 (quoting *Adams v. Texas*, 448 U.S. 38, 45 (1980)). Both the trial court and the Washington Supreme Court applied this standard. Br. Pet'r 26–31. Brown agrees that *Witt* sets out the correct legal standard (Br. Resp't 11–12), and Brown abandons the claim that the state court decisions were contrary to clearly established federal law under § 2254(d)(1). Br. Resp't 10.

b. The State Court Decision Was Not An Unreasonable Application Of Federal Law

Brown argues that the Washington Supreme Court's decision was an unreasonable application of clearly established federal law, entitling him to relief under § 2254(d)(1). Br. Resp't 11–19. Although Brown quotes the statute, his argument ignores the high burden he must meet. The unreasonable application prong of § 2254(d)(1) allows relief only if the "'state court identifies the correct governing legal principle from this Court's decisions but unreasonably applies that principle to the facts of the prisoner's case.'" *Holland v. Jackson*, 542 U.S. 649, 652 (2004) (quoting *Williams v. Taylor*, 529 U.S. 362, 413 (2000)). This standard requires "the state court decision to be more than incorrect or erroneous." *Lockyer*

v. Andrade, 538 U.S. 63, 75 (2003). Even "[t]he gloss of clear error fails to give proper deference to state courts by conflating error (even clear error) with unreasonableness." *Id.* To obtain relief, the decision must be objectively unreasonable. *Id.* at 75–76. Thus, § 2254(d)(1) imposes a "highly deferential standard for evaluating state-court rulings." *Woodford v. Visciotti*, 537 U.S. 19, 24 (2002) (per curiam). It "demands that state-court decisions be given the benefit of the doubt." *Id.* "[R]eadiness to attribute error is inconsistent with the presumption that state courts know and follow the law." *Id.* "[A] federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly." *Williams v. Taylor*, 529 U.S. 362, 411 (2000). In addition, whether a decision was reasonable depends upon the specificity of the rule. "The more general the rule, the more leeway courts have in reaching outcomes in case by case determinations." *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004).

Brown cannot satisfy this high burden. Whether a juror is substantially impaired is an issue of fact, determined primarily by the trial judge's observations of the juror during voir dire. *Witt*, 469 U.S. at 429–30; *Darden*, 477 U.S. at 175–76. Under clearly established federal law, whether a judge properly removed a juror depends upon whether there is a factual determination as to that juror's ability to perform the duties of a juror. If there is a factual determination that the juror was substantially impaired, then the state court decision cannot be objectively unreasonable. In this case, both the trial court and the Washington Supreme Court applied the standard in *Witt* and found that Mr. Deal's views on the death penalty would prevent or substantially impair the performance of his duties as a juror. Brown has not met his burden to establish, by clear and convincing

evidence, that these findings are incorrect. Accordingly, the Washington Supreme Court's decision upholding the trial court was not an objectively unreasonable application of the *Witt* standard.

Brown makes two arguments in challenging the Washington Supreme Court's application of federal law. First, Brown argues that the Washington Supreme Court found only that Mr. Deal was confused about Washington law, and that confusion is not a proper basis for challenging for cause in a capital case. Br. Resp't 12–13. However, Brown ignores the Washington Supreme Court's express finding that Mr. Deal was substantially impaired in his ability to follow the court's instructions and to abide by his oath as a juror. The Washington Supreme Court held:

> "The trial court *properly exercised its discretion in excusing for cause* prospective jurors Ms. Lisa Denis, Ms. Kristin A. Henderson and *Richard Deal* during voir dire. Their *views would* have prevented or *substantially impaired their ability* to follow the court's instructions and abide by their oaths as jurors." Pet. App. 208a ¶ 10 (emphasis added).

Moreover, the Washington Supreme Court did not rule that Mr. Deal was substantially impaired because he was confused. When the prosecution challenged Mr. Deal, the prosecutor referred to Mr. Deal's demeanor—describing Mr. Deal as "very confused" about statements of a defendant having to kill again. J.A. 75. The Washington Supreme Court ruled that the trial court did not abuse its discretion in excusing Mr. Deal because: "On voir dire [Mr. Deal] indicated he would impose the death penalty where the defendant 'would reviolate if released,' which is not a correct statement of the law." Pet. App. 173a. In sum, the Washington Supreme Court did not apply the wrong standard in this case.

Second, Brown argues for the first time in this Court that the Washington Supreme Court misunderstood Washington's capital punishment scheme by failing to recognize that future dangerousness is a proper factor for a juror to consider in the penalty phase of a capital case under Washington law. Br. Resp't 14–19. Brown's argument is without merit.

To begin with, Brown mischaracterizes both the Washington Supreme Court's decision and Mr. Deal's testimony. The Washington Supreme Court did not hold that Mr. Deal was substantially impaired because he would consider future dangerousness as a relevant mitigating factor. Rather, the Washington Supreme Court accepted the prosecutor's challenge that Mr. Deal would only vote to impose the death penalty where the defendant would reviolate if released. J.A. 75; Pet. App. 173a. There is a material difference between a juror who says death is only appropriate where it is proven the defendant will reviolate if released and a juror who would consider lack of future dangerousness as mitigating evidence in deciding whether to impose death or life. The former juror is saying I will not impose death if the defendant cannot reviolate. The latter juror is saying I can consider all of the evidence and then reach an impartial decision.

Brown also mischaracterizes Mr. Deal's testimony. He did not testify generally about lack of dangerousness as a mitigating factor. Rather, he testified about situations when death would be appropriate. In his questionnaire, Mr. Deal stated that death would be appropriate if "a person has killed and would kill again." J.A. 69. He testified, "if a person is, would be incorrigible and would reviolate if released, I think that's the type of situation that would be appropriate." J.A. 62. And he testified, "I guess it would have to be in my mind very obvious that the person would reoffend." J.A. 70. In fact, the only situations where Mr. Deal testified that the

death penalty would be appropriate is when the defendant would reoffend or if the defendant "wanted the death penalty." J.A. 59. The prosecution argued that Mr. Deal was impaired because he could vote for death only if the defendant would reoffend. J.A. 75. Based on the entire voir dire, Mr. Deal's demeanor, and the lack of an objection from defense counsel, the trial court dismissed Mr. Deal. This decision was not objectively unreasonable.

Brown's future dangerousness argument is wrong for a second reason. Brown claims that the Washington Supreme Court did not correctly set out the law when it stated on voir dire that "[Mr. Deal] indicated he would impose the death penalty where the defendant 'would violate if released.'" Br. Resp't 18. This statement by the Washington Supreme Court is correct. It is not the law in Washington that the only time the death penalty can be imposed is if the defendant will reoffend. Deal's understanding cannot be a correct statement of the law because the only possible penalties for aggravated first degree murder are death or life without parole. Yet Brown assumes that the Washington Supreme Court's statement refers to the mitigating factor of lack of dangerousness.

There is no basis for this assumption. The Washington Supreme Court is the ultimate expositor of state law, and the federal courts may not reexamine a state court determination of state law. *Mullaney v. Wilbur*, 421 U.S. 684, 691 (1975); *Estelle v. McGuire*, 502 U.S. 62, 67–72 (1991). "[A] state court's interpretation of state law, including one announced on direct appeal of the challenged conviction, binds a federal court sitting in habeas corpus." *Bradshaw v. Richey*, 126 S. Ct. 602, 604 (2005). The federal courts must necessarily assume that the Washington Supreme Court knew of, understood, and correctly applied state law in reviewing Brown's claim of error.

In addition, the evidence shows that the Washington Supreme Court was well aware of, understood, and correctly applied state law. The Washington Supreme Court opinion sustaining Mr. Deal's removal also analyzed, in depth, Washington's capital punishment law and the application of the law to Browns' trial. *See* Pet. App. 105a–19a, 184a–200a. As part of this analysis, the Washington Supreme Court specifically discussed the jury's consideration of various factors during the penalty phase, including "whether there is a likelihood the defendant will pose a danger to others in the future. . . ." Pet. App. 192a; *see also* Pet. App. 194a (discussing Brown's proposed jury instruction on future dangerousness). Brown's argument that the Washington Supreme Court somehow forgot that future dangerousness was a proper factor for jurors to consider in the penalty phase lacks merit given the court's lengthy discussion of the state capital punishment law.

In light of the state court factual determinations of substantial impairment, the Washington Supreme Court's decision that Mr. Deal was properly excused from the jury was not an unreasonable application of clearly established federal law. Brown is not entitled to relief under 28 U.S.C. § 2254(d)(1).

3. The State Court Decision That Mr. Deal Was Substantially Impaired Was Not Based On An Unreasonable Determination Of Facts Under § 2254(d)(2)

Brown also seeks relief under 28 U.S.C. § 2254(d)(2). Br. Resp't 19–28. Under § 2254(d)(2), an applicant is entitled to relief if the state court adjudication "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." The "objectively unreasonable" standard in § 2254(d)(2) is demanding. To be an unreasonable determination of the

facts, the evidence must be "too powerful to conclude anything but" the contrary of that reached by the state court. *Miller-El v. Dretke*, 545 U.S. 231, 265 (2005). That reasonable minds reviewing the record might disagree about the correct resolution of a factual issue is not sufficient to obtain relief. *Rice v. Collins*, 126 S. Ct. 969, 976 (2006).

Brown is not entitled to relief under § 2254(d)(2). He failed to overcome the presumption of correctness required by § 2254(e)(1). Brown has not proven, by clear and convincing evidence, that the state courts' finding of fact that Mr. Deal was substantially impaired was erroneous. *See supra* p. 5–9. If a state court finding of fact is not erroneous, it cannot be objectively unreasonable. If a state court finding is erroneous, relief is available only under § 2254(d)(2) if the erroneous finding of fact is also objectively unreasonable.

Even if Brown had met his burden under § 2254(e)(1), the state courts' findings are not objectively unreasonable because this case is "on all fours" with *Witt* and *Darden*. In both *Witt* and *Darden*, the trial court made no express finding that the juror was impaired. *Witt*, 469 U.S. at 430; *Darden*, 477 U.S. at 178. Defense counsel did not object to the prosecutor's challenge of the juror. *Witt*, 469 U.S. at 430–31; *Darden*, 477 U.S. at 178. In both cases, this Court gave deference to the trial court's ability to evaluate the demeanor of the juror. *Witt*, 469 U.S. at 425–26; *Darden*, 477 U.S. at 178. The same is true in this case.

Brown attempts to distinguish *Witt* and *Darden* because in "those cases the challenged jurors stated express views that would likely prevent them from following the law." Br. Resp't 21. But the same is true in this case. When asked when the death penalty would be appropriate, the only examples Mr. Deal pointed to were when the defendant would reoffend or when the

defendant wanted the death penalty. J.A. 62, 69, 70. Brown claims that Mr. Deal was not impaired because "Deal never said he could only impose the death penalty if there were proof that the defendant would kill again." Br. Resp't 13. But *Witt* rejected the notion that a juror was only impaired if the juror testified that he or she would automatically vote against the death penalty. According to the Court, the "determinations of juror bias cannot be reduced to question-and-answer sessions which obtain results in the manner of a catechism." *Witt*, 469 U.S. at 424. Rather, "[d]espite this lack of clarity in the printed record . . . there will be situations where the trial judge is left with the definite impression that a prospective juror would be unable to faithfully and impartially apply the law." *Id.* at 425–26.

We do not dispute that Mr. Deal also testified that he could follow the law. J.A. 73. However, the determination of substantial impairment is not limited to the juror's expressed profession that he can be fair and follow the law. *Morgan v. Illinois*, 504 U.S. 719, 734 (1992). "*Witherspoon* and its succeeding cases would be in large measure superfluous were this Court convinced that such general inquires could detect those jurors with views preventing or substantially impairing their duties in accordance with their instructions and oath." *Id.* at 734–35. Even when a juror states he can be fair and impartially follow the law, the judge must still determine whether this protestation is in fact true. *Patton v. Yount*, 467 U.S. 1025, 1036 (1984). Whether a juror can impartially follow the law, and in fact whether a juror actually means what he says when he says he can follow the law, is determined by the judge's observations of the juror.[4]

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[4] The National Association of Criminal Defense Lawyers is concerned with the unrestrained exclusion of jurors based upon their beliefs in the death penalty. NACDL Amicus Br. 4–9. That concern is simply not present in this case. Like *Witt*, this case concerns the

Thus the Court must examine the entire voir dire, not just selected questions. In light of the entire voir dire, the deference owed to the trial court judge, and defense counsel's lack of objection, the finding that Mr. Deal was substantially impaired is not objectively unreasonable

4. Conclusion

For the reasons stated herein, the decision below should be reversed.

RESPECTFULLY SUBMITTED.

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exclusion of an individual juror based upon the factual determination that the juror was substantially impaired. Judge Martinez applied the correct standard in order to seat an impartial jury, stating he would excuse a juror only if the juror was substantially impaired. *See, e.g.*, J.A. 7–9 (discussing *Witt* standard); J.A. 26 (granting defense challenge because juror was substantially impaired); J.A. 38–39 (denying prosecution challenge); J.A. 56, 117–18 (finding juror Henderson substantially impaired). Applying the substantial impairment standard, Judge Martinez granted only seven of the prosecution's twelve challenges, and only two of those were granted over a defense objection (Ms. Henderson and Ms. Denis). J.A. 127–37. Of the seven prosecution challenges objected to by defense counsel, Judge Martinez denied five of those because the jurors were not impaired. J.A. 127–37.